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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 582

VINCENT JOSEPH SPANO, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JULY 1, 1958
CERTIORARI GRANTED DECEMBER 15, 1958

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IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent

v.

VINCENT JOSEPH SPANO, Appellant

Decided April 3, 1958

OPINION—April 3, 1958

BURKE, J. Defendant has been convicted of murder in the first degree. Except for the issue as to the admissibility of a confession made by the defendant our affirmance of that conviction requires no discussion.

On February 3, 1957, the defendant telephoned one Bruno, a New York City policeman whom he had known for several years, and admitted to him that he had shot and killed the decedent, Palermo, after a fight. The next day at about 7.15 P.M., accompanied by his attorney, defendant surrendered on the street to an assistant district attorney of Bronx County and several police officers attached to the District Attorney's office. He was taken into custody pursuant to a bench warrant issued upon an indictment earlier found by the Bronx County Grand Jury. The bench warrant, as required by the Code of Criminal Procedure (§301), commanded the arresting officers "forthwith to arrest the [defendant] and bring him before [the] court * * * to answer the indictment; or if the court have adjourned for the term * * * [to] deliver him into the custody of the warden of the city prison of the city of New York." After his surrender defendant's counsel left and defendant was taken upstairs to the office of the assistant district attorney. When questioned he stated that he had been counseled to divulge his name but nothing more. He remained there until about midnight revealing nothing other than his name. While at the assistant district attorney's office he was fed by the police. Shortly after midnight defendant was removed to the 46th

Squad police headquarters for booking and fingerprinting. At about 3:30 A.M., after speaking to his patrolman friend Bruno for about an hour at the 46th Squad Office, defendant made a complete confession.

Upon the opening of court on the morning following his surrender defendant was arraigned before a County Court Judge.

It is clear in the record, and the fact is not now seriously challenged, that this confession was neither physically nor psychologically coerced. Defendant contends, however, that [fol. 3] the circumstances in which the confession was obtained render it inadmissible despite the fact that it was found to be voluntarily made. He argues that upon his surrender he was entitled either to be arraigned forthwith or to be forthwith delivered into the custody of the warden of the city prison. The failure of the arresting officers to do either of these things without undue delay, according to defendant, rendered the confession made intermediate the surrender and the arraignment inadmissible. As authority for this conclusion he relies principally upon the Supreme Court's decision in *Mallory* v. *United States* (354 U. S. 449).

Even if we concede to defendant that his detention was in violation of law it would not avail him here. By a long and uninterrupted line of decisions in this State it has been made indisputably plain that a confession is not vitiated solely because it has been procured during a delay in arraignment or unlawful detention (*Balbo* v. *People*, 80 N.Y. 484, 499: *People* v. *Trybus*, 219 N. Y. 18, 22-23: *People* v. *Doran*, 246 N.Y. 409, 423; *People* v. *Mummiani*, 258 N.Y. 394, 399-400; *People* v. *Alex*, 265 N. Y. 192, 194-195). By statute a confession is admissible unless involuntarily made under the influence of fear produced by threats or under a promise of immunity by the District Attorney (Code Crim. Pro., §395). Though it constitute a crime for which the responsible parties should be punished the unlawful detention is treated as no more than one element in the broader question of the voluntariness of the confession (*People* v. *Mummiani*, *supra*). It has significance only insofar as it lends to the establishment of the statutory grounds for exclusion.

The rule is no doubt different in the Federal system (*McNabb* v. *United States*, 318 U. S. 332, 341-345; *Upshaw* v. *United States*, 335 U. S. 410, 414; *Mallory* v. *United*

States, 354 U. S. 449, *supra*), but that does not affect us in this jurisdiction. The Supreme Court on several occasions has pointed out that the Federal Constitution does not impose upon State courts the rule of evidence which excludes a confession obtained while a prisoner was illegally detained, notwithstanding the fact that it was made without coercion (*Stein* v. *New York*, 346 U. S. 156, 187-188; *Stroble* v. *California*, 343 U. S. 181, 196-197; *Lisenba* v. *California*, 314 U. S. 219). The decision in the *Mallory* case is merely an exercise of the Supreme Court's supervisory power over courts in the Federal system (see *Stein* v. *New York*, *supra*) and as such is no more effective here than are the rules of evidence of our sister States.

There are, as defendant urges, factual distinctions between the present situation and that before the courts in the earlier cited cases. Here the warrant requiring defendant's prompt arraignment was a bench warrant issued upon an indictment. In the cited instances there was no [fol. 4] indictment extant at the time of the arrest. Moreover, custody of defendant in this case was not obtained by apprehension but by means of defendant's voluntary surrender made in the presence of defendant's attorney. These distinctions afford defendant no relief.

The rules of criminal procedure requiring prompt arraignment are designed in the main to guarantee that a person will not be detained except upon a clear showing of probable cause, and to provide the defendant with the opportunity of procuring legal counsel (see *Mallory* v. *United States*, 354 U. S. 449, 452-456, *supra*; *People* v. *Mummiani*, 258 N. Y. 394, 399-400, *supra*). Here there was evidence that these objectives had in effect been met. The indictment is, of course, a determination that probable cause existed for believing the defendant to be guilty of the crime charged. More that that, however, at the time of his detention and before interrogation there was a strong evidence of defendant's guilt out of his own mouth, in the form of his prior admission to patrolman Bruno over the telephone. In any event it was the duty of the police to verify the accuracy of the version of the conversation with the defendant given by Bruno. As for the opportunity to procure counsel, the record shows that defendant did have the benefit of counsel and counsel's instruction preliminary to his surrender. The

fact, impressed upon us by defendant, that he had been told by his attorney to disclose nothing but his name indicates that the subsequent interrogation was anticipated.

All that has been said assumes that there was in fact an unlawful detention of the defendant in this case. That fact is by no means established in the record. When defendant surrendered shortly after secen o'clock at night on February 4th the County Court had recessed for the day. The arraignment was had as soon thereafter as the courts reopened, at about 10:00 A.M., the following morning. Moreover, since the court had not "adjourned for the term" there was no injunction in the warrant requiring that defendant be turned over to the warden of the city prison.

It appears, therefore, that there was in fact no failure to arraign promptly and no requirement to cede custody of the defendant to the warden of the city prison. Under the circumstances the detention was not in violation of the mandate of the bench warrant, or for all that appears, of any law.

If we were to treat only of the defendant's arguments on appeal, we could end here. However, the additional reasons for reversal urged by the dissent make appropriate some further brief comments.

For the most part those arguments either assume a state of facts that simply are not before us or call for a new rule.

Whatever else may be said of *People* v. *McMahon* (15 N.Y. 384) and *People* v. *Mondon* (103 N. Y. 211) they are plainly [fol. 5] not controlling here. Those cases held that it was an invasion of the right of the accused to call him as a *witness* in a criminal hearing in which the charge was being examined. Confessions given under those circumstances were deemed inadmissible because it was considered that "a judicial oath, administered when the mind is disturbed and agitated by a criminal charge" might have the effect of preventing free and voluntary mental action (*People* v. *McMahon, supra,* p. 395). At best the soundness of this rationale is open to question (see *People* v. *Ferola,* 215 N.Y. 285, 293 *et seq.*) but, even granting its total validity today, it obviously has no application to the pre-arraignment confession with which we are presently concerned.

In our State law the test to be applied to the instant confession is that which was crystallized in section 395 of the

Code of Criminal Procedure requiring a determination as to whether a confession was voluntarily made in the traditional and ordinary sense, i.e., without duress, mental or physical. This is also the standard against which the confession must be measured for the purpose of determining whether or not it comports with the constitutional requirements of due process (*Gallegos* v. *Nebraska*, 342 U. S. 55, 65; *Brown* v. *Mississippi*, 297 U. S. 278, 285-286; *Stroble* v. *California*, *supra*, p. 197; *Stein* v. *New York*, *supra*, pp. 187-188). Obviously, since the confession before us was not extracted by means of threats, fear or violence but was freely or voluntarily given, there can be no valid objection to its admission on either of these grounds. Certainly, even the most vigilant guardian of civil liberties cannot fairly equate the present situation to that before the Supreme Court in *Rochin* v. *California* (342 U. S. 165) where it was held that admission in evidence of a confession procured by "unlawfully assaulting, battering, torturing and falsely imprisoning the defendant" (*Rochin* v. *California*, *supra*, p. 167) deprived him due process of law. The facts in this case show nothing comparable; there was here no coercion, violence or brutality to the person of the defendant (see *Irvine* v. *California*, 347 U. S. 128, 133).

The suggestion that the use of the confession is a violation of defendant's right against self-incrimination is also inappropriate on the present facts. That privilege is limited to cases where incriminatory disclosure has been extorted by the constraint of legal process directed against a witness (*People* v. *Defore*, 242 N. Y. 13, 25; *Adams* v. *New York*, 192 U. S. 585, 597, 598). The absence of any compulsion here makes that privilege inapplicable and *People ex rel. Kenny* v. *Adams* (292 N. Y. 65) cited in the dissent inapposite.

Nor can it be said that defendant has been denied a right to counsel guaranteed him by law. It should be considered in this regard that defendant did have the benefit of his [fol. 6] attorney's advice before being taken into custody and consistently followed that advice until he conferred with his friend, Bruno, with whom he had consulted the previous day. That notwithstanding, nothing in our statutes or cases and certainly nothing in the Federal law requires exclusion of a confession made during a pre-arraignment

questioning (see *People* v. *Mummiani*, 258 N. Y. 394, 400, *supra*; *Gallegos* v. *Nebraska*, 342 U. S. 55, 65, *supra*). In our State the statutes provide that the defendant has a right to counsel *upon arraignment* (Code Crim. Pro., §§ 188, 189, 296-a, 308, 690). It has always been the law of this jurisdiction that the mere fact that a confession was given by defendant while under arrest or to the State's officer in whose custody he was does not operate to exclude the confession (*Murphy* v. *People*, 63 N. Y. 590; *People* v. *Chapleau*, 121 N. Y. 266; *People* v. *Garfalo*, 207 N. Y. 141, 145). There is no legal requirement on the part of such officers to warn the defendant that he is under no obligation to make any statement and the failure to so warn him or to provide any of the safeguards available to him upon arraignment is no grounds for excluding his voluntary admissions of guilt (*People* v. *Randazzio*, 194 N. Y. 147, 158).

In sum, nothing in the law as it presently exists would bar the admission of defendant's confession under the circumstances here present. Nor were the circumstances of its rendition such as to prompt us to assume for ourselves, if indeed we properly can, the responsibility of ameliorative regulation by judicial decision. Whatever reservations may be entertained as to the propriety of the procedure followed by the State here may be directed to the Legislature (see *People* v. *Randazzio*, 194 N. Y. 147, 159-160, *supra*).

Accordingly, the judgment of conviction should be affirmed.

Desmond, J. (dissenting). This court has long since committed itself to the proposition that a confession if in fact voluntary may be admissible in evidence even though taken from a prisoner during an illegal detention (*Balbo* v. *People*, 80 N. Y. 484, 499) and even when taken in disregard of the statutory requirement of prompt arraignment before a magistrate (Code Crim. Pro., § 165; Penal Law, § 1844; *People* v. *Mummiani*, 258 N. Y. 394, 396, 411-412). But now we go much further. Now we accept as evidence a confession extracted during the very course of judicial proceedings, after indictment and surrender on a bench warrant, when the time for investigation has passed and when the prisoner, no longer a suspect but now a defendant held under court process awaiting trial, has retained counsel who

has warned him not to give evidence to the public authorities. A citizen, learning that he has been indicted and that a bench warrant is outstanding against him, consults an attorney. The attorney, conforming strictly to his profes- [fol. 7] sional duty, instructs his client forthwith to surrender, arranges for surrender to the representatives of the Distict Attorney's office at a police station. The lawyer accompanies his client to the place of surrender, warns him not to make any statement, then leaves his client in the custody of the officers, justifiably confident that the client's rights are safely under the protection of the court and of its mandate. The prosecutor, in his brief on this appeal, reminds us that "Spano's attorney could have waited until 10:00 A.M. the next morning and surrender his client to the County Court". Of course he could, but, as we shall show, defendant's rights and immunities would be no different, since whether at 7:00 P.M. or 10:00 A.M., the surrender was to the court in obedience to its process.

The bench warrant, pursuant to section 301 of the Code of Criminal Procedure, directed the peace officers to arrest defendant "and bring him before the court to answer the indictment". No policeman or prosecutor had any right to change or disregard that direction. Defendant was in the custody of the court for the sole purpose of pleading to the indictment and awaiting trial in due course. All this was deliberately ignored by the police and prosecutor. Defendant, as soon as his lawyer was safely out of the way, was taken to the District Attorney's office, there questioned until midnight, then removed to a police station where after more questioning he finally made, at 3:30 o'clock in the morning, the confession we are considering. A more grievous and offensive disregard of a court's mandates and a citizen's rights can hardly be imagined. Our duty is not to condone it but to condemn it and to lay down a rule that will prevent its recurrence.

Usually, of course, the test for admissibility of a confession is voluntariness (Code Crim. Pro., § 395) and usually voluntariness is a question of fact for a jury (*People* v. *Valletutti*, 297 N. Y. 226, 231). But in one of the senses in which the courts use the word "voluntary", a confession or incriminating testimony taken from a defendant without warning of his rights during the progress of the criminal

cause against him is not "voluntary" (*People* v. *McMahon*, 15 N. Y. 384, 388 *et seq.*; *People* v. *Mondon*, 103 N. Y. 211, 217 *et seq.*). Since in such a case the fact is undisputed, the question is not one for the jury but a constitutional question of due process on undisputed fact (*Gallegos* v. *Nebraska*, 342 U. S. 55, 62). Some violations of right are too fundamental to be excused by a jury of laymen. Directly and frankly violated here were two such rights: the right to have the advice of a lawyer at every stage of a court proceeding, and the right not to be forced to testify against oneself during such a proceeding.

Our statutes and decisions (Code Crim. Pro., §§ 308, 699; *People* v. *McLaughlin*, 291 N. Y. 480; *People* v. *Marincic*, [fol. 8] 2 N. Y. 2d 181) endlessly state and repeat the guarantee of every defendant's right to have the effective services of counsel at every stage of every criminal cause. But what use are these to a prisoner who, held awaiting trial, is questioned in the absence of his counsel, and contrary to counsel's express directions, until he confesses? Before a magistrate or a coroner or other judicial officer a defendant may under no circumstances be forced to make admissions of his guilt (see *People* v. *McMahon*, 15 N. Y. 384, *People* v. *Mondon*, 103 N. Y. 211, *supra*). Yet the same defendant in the same criminal cause held under the process of the same court, can (it is now decided) be subjected to secret midnight questioning, out of reach of any lawyer, until he confesses. Despite the *People* v. *Defore* rule (242 N. Y. 13) this is a violation of the right against self-incrimination since the defendant is compelled in the course of a criminal prosecution to incriminate himself by his own utterances (*People ex rel. Kenny* v. *Adams*, 292 N. Y. 65, 70 *et seq.*). Surely this is the use by the State of another method of obtaining evidence which "shocks the conscience", offends accepted "canons of decency and fairness" and so invades the due process clause of the Fourteenth Amendment (*Malinski* v. *New York*, 324 U. S. 401, 412-418; *Rochin* v. *California*, 342 U. S. 165, 171, 172).

We find no New York decisions condemning the practice employed here, probably because it is (let us be grateful) infrequent. But the reasoning, though not the result, of *People* v. *Perez* (300 N. Y. 208, 217, 218) requires a new trial here. Perez was held not as a defendant but, by court

order, jailed as a material witness. He claimed on the trial that his protracted questioning in jail over a period of several days, plus refusal to let him see a lawyer, violated his rights and made his confession inadmissible. This court, rejecting the contentions, pointed out that he was in jail not as a defendant awaiting trial but as a witness who had stated to the police that he could help them find the culprit. As to consulting counsel, the record showed that Perez never asked his visiting relatives or the assistant district attorney to get him a lawyer. It is strongly suggested in the Perez opinion (see 300 N. Y. 219) that were Perez actually a defendant the decision would have been different.

Even in *Lanza* v. *New York State Joint Legis. Comm.* (3 N Y 2d 92, cert. denied 355 U. S. 856), while we refused to ban disclosure by the committee of the eavesdropped talk in the jail between Lanza and his lawyer, we flatly held that "if such interference had occurred in connection with a proceeding directed against Lanza, any resulting determination would be annulled by the courts on the ground that the interference with his right to counsel had destroyed his constitu-[fol. 9] tional right to a fair trial" (3 N Y 2d 98, citing *Matter of Fusco* v. *Moses*, 304 N. Y. 424, and other cases). We said in *Lanza* that "where in the course of a criminal trial the defendant's right to confer privately with his counsel has been violated, the trial is vitiated" (3 N Y 2d 98). Why should not the same good rule be applied here?

This defendant may be a hoodlum and a killer but it is such wretches who most need the constitutional guarantees. And, if such a man be deprived of his basic rights under the law, what man is safe?

The judgment should be reversed and a new trial ordered.

Chief Judge Conway and Judges Dye and Froessel concur with Judge Burke; Judge Desmond dissents in an opinion in which Judges Fuld and Van Voorhis concur.

Judgment of conviction affirmed.

[fol. 10] IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of April in the year of our Lord one thousand nine hundred and fifty-eight, before the Judges of said Court.

Witness,

The Hon. Albert Conway, Chief Judge, Presiding;
Raymond J. Cannon, Clerk.

REMITTITUR April 3, 1958

[fol. 11]

No. 173

THE PEOPLE &c., Respondent

vs.

VINCENT JOSEPH SPANO, Appellant

Be it Remembered, That on the 28th day of June in the year of our Lord one thousand nine hundred and fifty-seven, Vincent Joseph Spano, the appellant—in this action, came here unto the Court of Appeals, by Herbert S. Siegal, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court, Bronx County. And The People of The State of New York, the respondent—in said action, afterward appeared in said Court of Appeals by Daniel V. Sullivan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 12] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Herbert S. Siegal, of counsel for the appellant—, and by Mr. Irving Anolik, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of conviction

of the County Court, Bronx County, appealed from in this action, be and is hereby in all things Affirmed:

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

[fol. 13] Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Bronx County, before the Judges thereof, according to the form of the statute in such case made and provided.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York. Court of Appeals, Clerk's Office, Albany, April 3, 1958.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 14] IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Present, HON. ALBERT CONWAY, Chief Judge, presiding.

Mo. No. 300

THE PEOPLE &c., Respondent,

vs.

VINCENT JOSEPH SPANO, Appellant

ORDER AMENDING THE REMITTITUR—June 25, 1958

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, That the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

"Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that admission into evidence of a confession rendered by him violated the Fourteenth Amendment of the Constitution of the United States. This Court held to the contrary."

And the County Court, Bronx County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Gearon Kimball, Deputy Clerk.

[fol. 15] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1958

No. 80 Misc.

VINCENT JOSEPH SPANO, Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —December 15, 1958

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same

is hereby, granted. The case is transferred to the appellate docket as No. 582.

And it is further ordered that the duly certified copy of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this motion and application.

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